NO. 81-6657

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DANIEL JOSEPH BAKER,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether or not comments or arguments by the State Prosecutor operated to deprive Petitioner of a fundamentally fair trial on either the issues of guilt/innocence or sentencing?

2.

Whether or not Petitioner received effective assistance of counsel?

3.

Whether or not, under the facts of this case, Petitioner's death penalty is properly supported in part by the jury's finding of a statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2)?

4.

Whether or not the trial court properly acted to permit the jury foreman to correct the written sentencing verdict when it was shown that the written verdict did not truly reflect the jury's intentions?

5.

Whether or not the failure of the trial court to instruct the jury on the specific terminology within Ga. Code Ann. § 27-2534.1(b)(7), and the prosecutor's closing arguments during the sentencing phase of Petitoner's trial, operated to deprive Petitioner of due process in light of the trial court's instructions as a whole, the overwhelming evidence supporting said aggravating circumstance and in light of the detailed review by the Georgia Supreme Court on appeal?

6.

Whether or not the trial judge's comments or his statements to the jury operated to improperly and unconstitutionally prejudice Petitioner?

7.

Whether or not Petitioner's death sentence should be vacated assuming arguendo this Court invalidates only one of the two statutory aggravating circumstances supporting said sentence?

8.

Whether or not under the facts of this case, Petitioner's death sentence constitues cruel and unusual punishment?

9.

Whether or not the trial court's instructions relating to sentencing, and specifically relating to mitigation, were sufficient to insure that Petitioner's due process rights were not violated?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Daniel Joseph Baker, was indicted along with co-defendant Ricky Lee Massey by the March Term, 1978, Gwinnett County, Georgia Grand Jury for the murder and armed robbery of Dennis Beatenbo. Following a jury trial in which the Petitioner was separately tried from his co-defendant, Petitioner was found guilty on both counts and was sentenced to death pursuant to the murder conviction and received a sentence of life imprisonment for armed robbery. The jury found two statutory aggravating circumstances authorizing the imposition of Petitioner's death penalty, those being (a) the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant [see Ga. Code Ann. § 27-2534.1(b)(7)], and (b) the offense of murder was committed while the Petitioner had been engaged in the commission of an additional felony, to wit: the armed robbery of Dennis Beatenbo, [see, Ga. Code Ann. § 27-2534.1(b)(2)].

Petitioner's case was automatically reviewed on appeal by the Supreme Court of Georgia, which affirmed his convictions and sentences. Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979). Thereafter, on May 27, 1980, this Court granted Petitioner's application for a writ of certiorari, and vacated Petitioner's death penalty, remanding his case for further review by the Georgia Supreme Court in light of this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980). Baker v. Georgia, 446 U.S. 961 (1980).

Upon remand, the Supreme Court of Georgia again reaffirmed Petitioner's death sentence. Baker v. State, 246 Ga. 259, 272 S.E.2d 61 (1980), and this Court thereafter denied Mr. Baker's second petition for a writ of certiorari. Baker v. Georgia, 450 U.S. 936 (1981).

On April 2, 1981 the Superior Court of Gwinnett County rescheduled Petitioner's execution date for April 16, 1981. Petitioner then filed a request for a stay of execution and a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. A hearing was held on the state habeas corpus application on July 14, 1981, and on October 14, 1981 said superior court issued an order denying state habeas relief. (See Appendix D to the Petitioner). The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal on December 3, 1981. (See Appendix E to the Petition). Thereafter, Petitioner filed this third petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

As noted in the previous section, Petitioner was indicted along with co-defendant Rick Massey for the May 5, 1978 murder and armed robbery of Dennis Beatenbo. The evidence shows that during the evening on the aforesaid date, Petitioner and a friend, Rick Massey, had been drinking while driving around the Norcross, Georgia community area. Seeing Dennis Beatenbo walking along the road, Massey and the Petitioner stopped and asked him if he needed a ride. (T. 149-150). In exchange for this ride Beatenbo offered Petitioner and Massey some liquor which was contained in a bottle located in Beatenbo's automobile that had been parked elsewhere. (T. 70, 150, 261). In a statement

to the police, the Petitioner related that when Beatenbo left Massey's car to retrieve the liquor, Massey suggested that they "roll" him. (T. 150). Beatenbo returned and the three men then went for a drive while continuing to consume the liquor. Eventually they drove to an isolated spot at a nearby lake. (T. 150). Thereafter, Beatenbo began to feel nauseated. While Massey opened the back door so that Beatenbo could get out of the car, the Petitioner placed a newly purchased .25 caliber pistol in his belt. (T. 151).

In his confession to the police, Petitioner related that as Beatenbo was lying on the back seat with his head hanging over, Petitioner smashed Beatenbo in the head with the liquor bottle, causing the bottle to break. Beatenbo then raised up and fell out of the other side of the car, lying with his back on the ground. (T. 151, 251). The Petitioner then took the victim's wallet and watch while Massey observed. (T. 151). In Petitioner's own words, "I reached in by belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and pulled the trigger, I don't know how many times I shot him, but I could hear him moaning and trying to say something." (T. 151). The Petitioner and Massey then split the $22.00 found in the victim's wallet, and drove to Petitioner's trailer. (T. 152). Dennis Beatenbo's body was discovered the next morning. (T. 78).

During the trial, the State Medical Examiner testified that the victim had suffered a crushing blow to his face which broke his nose and damaged his eye and facial tissues. He further testified that the victim had received four gunshot wounds, three of which were the result of the pistol being pressed firmly against the victim's body and fired directly

into his chest. One bullet was also maliciously fired into the victim's scrotum area; however, Dr. Dove theorized that this shot was fired after the victim had died. (T. 97-102). Another State's witness, Bobby Barnes, testified that on Friday, May 5, 1978, the Petitioner had admitted that he killed a man in a robbery by hitting him in the face with a bottle, then shooting him. (T. 82-83). Barnes also testified that he had seen the Petitioner with the gun while at the Petitioner's trailer. (T. 84). After Petitioner's arrest, he informed the police where to find the pistol which was used in the murder, and his co-defendant Massey, led the police to Beatenbo's watch which had been discarded. (T. 132, 162). During the course of police questioning, Baker stated that Massey had never suggested killing Beatenbo, but suggested only that they rob him. It was soley Baker's idea to kill the victim, and when asked why he had done it he answered, "Just to watch him die." (T. 158, 168).

Petitioner was convicted of the murder and following the punishment phase of the trial, the jury found that the death penalty was justified based on two aggravating circumstances, those being: (1) the murder was committed while the Petitioner was engaged in the armed robbery of the victim; and (2) the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the Petitioner. (T. 309-310).

Additional facts may be recited in the following portion of this Biref when necessary to more fully explain Respondent's argument.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER WAS NOT DEPRIVED OF A FUNDAMENTALLY FAIR TRIAL EITHER DURING THE GUILT/INNOCENCE PHASE OR DURING THE SENTENCING PHASE OF HIS CRIMINAL PROSECUTION FOR ARMED ROBBERY AND MURDER.

Petitioner's first argument attacks the actions of the state prosecutor at Petitioner's trial contending that as a result of said prosecutor's comments and actions, Petitioner was unduly prejudiced and deprived of a fair trial in violation of his Fifth, Eighth and Fourteenth Amendment rights to the United States Constitution. A review of the entire trial transcript, however, amply demonstrates that this allegation is unmeritorious.

In support of this assertion, Petitioner first argues that during the closing argument, the state prosecutor erroneously tendered his own, personal opinion as to the defendant's guilt. The state habeas court made a finding that while the prosecutor had expressed a personal belief as to the Petitioner's guilt during the guilt/innocence phase of the trial, said comment was harmless in light of the fact that Petitioner did not contest his guilt. (See Appendix D of the Petition, p. 9a-10a). Moreover, the state's evidence against the Petitioner was overwhelming, and included his admission of guilt to a private citizen who testified at his trial (T. 82), and which also included his voluntary confession to the police. (T. 148-152).

Here, Petitioner cites one sentence, taken out of context, to support his position that the state prosecutor imposed his personal opinion as to the Petitioner's guilt upon the jury. A review of the record shows that immediately before and immediately after the challenged statement, the prosecutor reminded the jury that the state was required to prove guilt beyond a reasonable doubt. The prosecutor stated:

> Witnesses, State is required to prove the guilt beyond a reasonable doubt. No need in bringing in all the witnesses and every possible witness, every Tom, Dick and Harry that is of some insignificant consequence.
>
> I don't believe there is any question in this case, not only beyond a reasonable doubt, but beyond any doubt in this case that this Defendant committed the murder and armed robbery of Dennis Beatenbo.
>
> The law says we are required to prove it beyond a reasonable doubt. In this case I submit to you under the evidence, is beyond all doubt. No doubt that he committed the offenses. (T. 184-185).

Of course, before improper jury argument may be a basis for federal habeas corpus relief under 28 U.S.C. § 2254, the argument must be so prejudicial that the applicant's state trial was rendered fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Alverez v. Estelle, 531 F.2d 1319, 1323 (5th Cir. 1976). It is well established that in reviewing

prosecutorial actions for possible prejudice, each case must be considered on its particular facts. The prosecutor's comments must not be considered in isolation from the remainder of the trial. The comments must be evaluated in the context of the trial as a whole. Cobb v. Wainwright, 609 F.2d 754 (5th Cir. 1980), cert. den., 447 U.S. 907 (1980).

Counsel's arguments should not contain his own comments or opinions about the merits of the case or as to his personal opinion on the defendant's guilt. United States v. Rodriquez, 585 F.2d 1234, 1243 (5th Cir. 1978). However, a prosecutor's expression of personal belief may, in some cases be tolerated, if it is based solely upon the evidence introduced and the jury is not led to believe that other evidence, unavailable to them, justifies the belief. Id., at p. 1243. In assessing the potential prejudicial impact of any improper comments relating to personal belief on the guilt of the accused, the comments must be considered in light of the strength of the totality of the evidence against the defendant. Id., at p. 1244, accord, United States v. Dorr, 636 F.2d 117, 121 (5th Cir. 1981); Berger v. United States, 295 U.S. 78, 89 (1935).

Here, a review of the prosecutor's comments reflects that, in actuality, he was referring to the overwhelming amount of evidence produced by the state which eliminated all question beyond a reasonable doubt of the defendant's guilt. Moreover, even if this Court should find that the prosecutor's comments were some reflection of his personal opinion, in light of the overwhelming accumulation of evidence which went unrebutted at trial, the aforesaid comments by the state prosecutor, would, at most, have been harmless error.

Secondly, Petitioner asserts that the prosecutor suggested to the jury that it had not heard all of the evidence. He cites page 181 of the prosecutor's arguments and quotes the statement, "Obviously I did not tell you everything, . . ." Again, the statement cited by the Petitioner is taken out of context. In the immediately preceding paragraph, the prosecutor referred to his opening statements to the jury wherein he stated the state would prove that Petitioner committed the offenses of armed robbery and murder, and the circumstances of the crimes. When the prosecutor stated, "Obviously I did not tell you everything, but as the evidence came earlier it won't take as long.", the prosecutor was referring to his opening statement to the jury.

Petitioner also refers to the comment on page 184 where the prosecutor stated:

> Witnesses, State is required to prove the guilt beyond a reasonable doubt. No need in bringing in all the witnesses and every possible witness, every Tom, Dick and Harry that is of some insignificant consequence." (T. 184).

As the state prosecutor testified at the state habeas proceeding, this reference to not calling every possible, insignificant witness was made simply because the names of numerous other people were mentioned during the testimony at trial and the state prosecutor was simply saying that although he had the burden to prove guilt beyond a reasonable doubt, there was no burden upon him to bring in every witness of insignificant consequence. (HC. 42-43). The prosecutor

obviously was not intending to infer to the jury that there was even more evidence which they could have, but which they did not present to show Petitioner's guilt. At most the comments could be interpreted as indicating that there may have been some additional witnesses, but these witnesses would have been insignificant to the case. This did not prejudice the Petitioner, and in no way deprived him of a fundamentally fair trial.

Likewise, the comments of the state prosecutor during the sentencing phase of the trial did not amount to suggestions that the jury did not hear all of the evidence which may have been unfavorable to the Petitioner. The state prosecutor's comment during closing argument of the sentencing phase of the trial as reflected on page 273 of the transcript was simply a comment upon why the state had not presented witnesses during the sentencing phase. This was because the state had no idea what sort of evidence the defendant would tender. The prosecutor's comments were not attempts to insinuate that the witnesses' credibility could have been attacked through the testimony of uncalled state witnesses. The case of Ginsberg v. United States, 257 F.2d 950 (5th Cir. 1958), cited by Petitioner, is distinguishable from the instant case, because the prosecutor there specifically stated,

> Now with respect to character witnesses Mr. Fowler had stated that Mr. Worton [the prosecutor] didn't produce anybody who would say that he is a bad man. . . I could probably have fifty people in here who would show that he isn't a good character. I'm not trying Mr. Ginsberg's character. . . . Id., at p. 954.

Here, the prosecutor made no such comments that he had numerous witnesses who could probably have rebutted Petitioner's character witnesses, but he was simply implying that he had no opportunity to present any rebuttal witnesses since he had no idea as to what the defense witnesses were going to say.

In any case, this one comment by the prosecutor again is simply insignificant when compared to the evidence produced at the entire trial, and did not deprive Petitioner of a fundamentally fair sentencing proceeding or due process of law.

Petitioner's third allegation of prosecutorial misconduct asserts that he was prejudiced as a result of the state prosecutor's comments which referred to facts outside of the record and the result of the prosecutor's misstating evidence. As his first example he cites the prosecutor's statements on page 273 of the trial transcript, wherein the prosecutor stated,

> What about Dennis Beatenbo? He's got a family, sisters and brothers, a mama and a daddy here. He worked in the construction work, and, you know, he worked there for the last eight years. Tough life. Full of life. Enjoyed life. (T. 273).

First of all, Petitioner misstates that the prosecutor argued "that the victim had a fine family and was a good worker . . ." (Petitioner's Brief, p. 14). Petitioner misstates that there was no evidence in the record to support the aforesaid statements by the prosecutor. For example, witness John D. Smith did testify that Dennis Beatenbo had been employed for the previous eight years as a construction worker installing pipes

on a pipe line. (T. 68). Witness Dean Bain also testified that he had known and worked with Dennis Beatenbo, and had been drinking with him at a local Holiday Inn from 6:00 p.m. until approximately 12:00 a.m. on the day before the murder. (T. 75-76).

Certainly, it could also be inferred that Dennis Beatenbo had a family, a mother and a father. The prosecutor's further statements that he had sisters and brothers simply do not rise to any constitutional deprivation. Furthermore, contrary to the Petitioner's contentions, the prosecutor did not make any comments at all pertaining to the good qualities of the victim's family.

Although Petitioner asserts that the prosecutor erroneously expressed his own opinion during the guilt/innocence phase of the closing argument, when he stated that the Petitioner wanted to see if his gun would kill a human being and that the Petitioner appeared to be proud of the murder, it is clear from a review of the record that these statements were obvious inferences which could have been drawn from the evidence. For example, following the murder Petitioner freely admitted to witness Bobby Barnes how he had killed Dennis Beatenbo by hitting him in the face with a bottle and shooting him. Petitioner also told Barnes that he had taken $22.00 from the victim. (T. 82-83). In his confession to Officer Phillip Whitley, Petitioner told how he had shot the victim, "Just to watch him die." (T. 168).

Although Petitioner asserts that the prosecutor made references to his own family life, comparing it to that of the Petitioner, a review of the record shows that such references

were quite brief, and only by the wildest stretch of the imagination can it be concluded that they were in any way prejudicial. For example, Petitioner refers to the prosecutor's comments on page 272 of the trial transcript. There the prosecutor stated,

> To be sure, the Defendant probably was not raised the way you and I were raised, and I use the word raised instead of reared because when mama and daddy run the store down there they raised the kids. (T. 272).

If anything, the aforesaid comment by the prosecutor was beneficial to the Petitioner, because the prosecutor inferred to the jury that it was obvious that the Petitioner did not have a normal family life. The further comments by the prosecutor were so trivial so as to not merit any additional comment herein. Likewise, the comments on page 276 of the trial transcript wherein the state prosecutor made miniscule references to his own family did not overstep the bounds of proper prosecutorial argument. A review of the transcript shows that the prosecutor stated,

> All of his grownup life he had the benefits of what I would call maybe not the best mama, but what is the best mama in the world? I think I had the best one. I'm sure Ms. Baker did the best she could and gave him everything she could. But you heard him. He said I was just -- well, you know, it first came out Ms. Baker, well, he had a little problem, a little scuffle or little thing, you know, I had to bring out,

you know, he beat his daddy up so bad it broke his jaw and sent him to the hospital. (T. 276-227).

Likewise, the prosecutor's slight misstatement that the Petitioner had dragged the body a short distance really could not have had any bearing on the jury's ultimate sentence determination, when the evidence overwhelmingly showed that the Petitioner maliciously smashed a whiskey bottle into the face of the victim, and while the victim was lying helpless on the ground placed a revolver directly against his chest and fired three times, and thereafter fired an additional time into the victim's scrotum.

Petitioner also contends that the prosecutor improperly injected his personal knowledge about a disputed matter into evidence. A review of the transcript again, shows that this criticism of the state prosecutor is unwarranted and unsupported by the record.

On direct examination, the victim's mother testified that she learned about her son's participation in the murder while she was home alone. She insinuated that someone had simply called her and coldly told her that her son had shot someone in the head and killed him, that the victim was drunk and her son was sober, and that her son "blew the head off or shot him in the face . . ." On cross-examination, the prosecutor simply elicited the truth about how he had called her, had told her he had some bad news to give her, that he had attempted to get in touch with some of her relatives because he knew she was alone, and that he had called neighbors to come be with her. Petitioner's assertions that the prosecutor was attempting

to infer to a jury that he was a fair, reasonable and sensitive man and that he "apparently suggested to the jury that such a considerate man would not request the death penalty unless it was necessary," is simply unfounded speculation.

Likewise, Petitioner erroneously states that the prosecutor induced a government witness to express a prejudicial opinion. A review of the record shows that to the contrary, the prosecutor attempted to stop the witness from making any prejudicial statements. Prior to the testimony of Dr. Donald Dove, the Medical Examiner, the defense moved the court to prohibit witness Dove from testifying, as he had done in a previous trial, that the fourth shot to the victim's scrotom was not meant to inflict death, but was only meant to inflict pain, and was fired in an effort to determine whether or not there was still life in the body. (T. 92-93). The trial court agreed with the defense that testimony as to the defendant's intent should be left out; however, the court agreed with the district attorney that the doctor could testify that the type of wound was not the type of wound that would inflict death.

The questioning of Dr. Dove, in no way substantiates Petitioner's contention that the prosecutor elicited any improper testimony. Petitioner does not cite the actual testimony of Dr. Dove. The following transpired:

> Q. [District Attorney Huff]: Okay. Now, if the evidence and testimony in this case showed that he had been knocked out and rendered unconscious and was lying prone, do you have an opinion from your autopsy report -- from your

autopsy then how the gunshot would have entered through the scrotum and up in there?

A. [Witness Dr. Dove]: Well, I'm certain that the gun was just placed in this position and fired in this position. Of course, it was not meant to --

Q. You can't do -- you can't go into that -- now --

A. Okay.

MR. PELHAM. [Defense Counsel]: Your Honor --

THE WITNESS: This of course was not an effort to kill the individual, it's not the type wound that would kill him.

MR. PELHAM: Your Honor --

THE COURT: I will strike that it was not an attempt, but he can say -- he can say what type wound it was.

MR. PELHAM: Yes, sir, I think he had already said that, I believe.

THE COURT: The jury will disregard the conclusion that what effort was made, but may consider what type wound the doctor said it was. (T. 99).

Thus, the aforesaid testimony shows that the district attorney was simply attempting to elicit how the fourth shot was fired, and he further attempted to stop the witness from testifying as to any opinion pertaining to the intent

of the defendant when he fired that fourth shot. This is also substantiated by District Attorney Huff's testimony at the state habeas hearing. When asked what he was attempting to elicit from the witness with his questioning, he stated:

> I was attempting to elicit from the doctor his opinion that the gun would have had to have been brought down, between the legs and fired to go up into the body, since he was lying on the prone, rather than standing up over him and shooting through the scrotum.
>
> In other words, this bullet did not traverse the body from above downward, it traversed the body parallel with the ground which laying -- I was merely asking him what position would the gun have had to have been in for the projectile to have entered the scrotum and gone and trajected the victim's body in that manner. (HC. 52).

Thereafter, the prosecutor specifically and unequivocally stated he was not attempting to elicit any testimony pertaining to the state of mind of the Petitioner when the shot was fired. (HC. 53).

Petitioner also asserts that the prosecutor improperly related to the jury his personal opinion as to aggravating circumstances and "other matters" which were to be decided by the jury.

A review of the alleged improper comments in the context of the entire record shows that they were either reasonable inferences from the evidence, were supported by the evidence, or were proper arguments to the jury urging them to impose capital punishment.

Under Georgia law it is permissible for a prosecutor to argue for the death penalty, and to offer plausible reasons for his position. Chenault v. State, 234 Ga. 216 (7), 215 S.E.2d 223 (1975); Strickland v. State, 209 Ga. 675 (2), 75 S.E.2d 6 (1953); Allen v. State, 187 Ga. 178, 182, 200 S.E. 709 (1938). Additionally, a prosecutor may urge that the jury impose strict punishment. Chenault, supra; Bailey v. State, 153 Ga. 413, 414 (4), 112 S.E. 453 (1922); Coker v. State, 234 Ga. 555, 573, 216 S.E.2d 782 (1975), sentence rev'd on other grounds sub nom, Coker v. Georgia, 433 U.S. 584 (1977). Here, the district attorney's arguments were simply attempts to persuade the jury that there were sufficient circumstances which authorized capital punishment in this case.

Petitioner's assertions that the prosecutor improperly utilized inflammatory language by labeling defendant as "one mean man," or that he referred to alleged prejudicial terms such as "pumped him full of bullets" or "blowing him away" are unmeritorious since the comments were fully supported by the evidence. Moreover, there was no objection to the terminology used, and it was not so prejudicial as to deprive Petitioner of a fundamentally fair sentencing hearing.

Petitioner asserts that the prosecutor improperly made a "deterrence argument" by urging the jury to render the

consciousness of the community based on alleged irrelevant matters, does not truly reflect the prosecutor's statement. In fact, he stated, "Your verdict should and ought to seek and do nothing more than render the conscious [sic] of this community as to what the appropriate penalty is for this defendant for this crime." Thus, the prosecutor was urging the jury not to base its decision upon wholly irrelevant considerations as Petitioner suggests, but he was urging the jury to focus upon this defendant and the circumstances of this crime. Petitioner's references to an article written by the prosecuting attorney in September of 1975 or 1976, several years before the Petitioner's trial, is completely irrelevant and immaterial to this case.

In conclusion, Respondent submits that since Petitioner's arguments, that he was unconstitutionally prejudiced by the district attorney's comments in this case, are unsupported by the record, and since the record, in fact, shows that Petitioner was not deprived of a fundamentally fair trial on either the guilt/innocence issue or in the sentencing proceeding, this Court should refuse to grant certiorari to review Petitioner's first issue.

II. THE STATE HABEAS CORPUS COURT'S FINDING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WAS SUPPORTED BY SUBSTANTIAL EVIDENCE PRESENTED AT THE STATE HABEAS PROCEEDING.

Under Petitioner's second argument he sets forth nine areas wherein he claims he received ineffective assistance of counsel. A review of the record of Petitioner's trial, and review of testimony at the state habeas proceeding, shows that the state habeas court properly found that Petitioner failed to carry his burden of proof on this issue.

Petitioner initially asserts that trial counsel failed to file proper pretrial motions such as a challenge to the grand and traverse jury pools in Gwinnett County, Georgia and further failed to file a motion for change of venue.

Pertaining to the failure of Petitioner's trial attorney to file a motion for change of venue, at the state habeas hearing Petitioner was able to introduce only two very short newspaper articles which referred, in part, to Petitioner's indictment and trial. Neither article was prejudicial to the Petitioner. (HC. 155-156). Additionally, there was testimony at the state habeas proceeding from the district attorney who stated that the pretrial publicity in Petitioner's case was minimal in relation to normal homicides which had occurred in Gwinnett County, Georgia. In the words of the district attorney, ". . . there just wasn't anything unusual about the case that generated any widespread publicity on the case." (HC. 46).

Petitioner's trial attorney testified at the state habeas proceeding that he saw no basis to attack the grand or traverse jury pools. Both he and the district attorney testified that a previous challenge to the Gwinnett County jury pools had been made by a criminal defense orgainzation shortly before Petitioner's trial, and upon investigation, the challenge was finally dropped. (HC. 47, 66, 82). Additionally, Petitioner presented no evidence at the state habeas proceeding to support his contention that the Gwinnett County jury pool was unconstitutionally composed in any respect.

Petitioner also raises several contentions of ineffective assistance of counsel during trial. These criticisms relate to the way counsel conducted his jury voir dire, counsel's failure to object to certain evidence, counsel's failure to present no evidence during the guilt/innocence phase of Petitioner's trial, counsel's summations to the jury during both the guilt/innocence phase and the sentencing phase of the trial, counsel's failure to move for funds for expert witnesses and counsel's alleged failure to invoke the rule of sequestration.

All of these issues pertaining to counsel's actions at trial relate to trial tactics and the manner in which Petitioner's particular attorney decided to conduct his case. Petitioner's contention that the jury voir dire and summation arguments were cursory or ineffectual, are simply the opinion of Petitioner's present attorneys. Counsel presented no evidence in Petitioner's defense during the guilt/innocence phase of the trial, because he had no evidence to present although he engaged in a detailed investigation of the case. (HC. 86-87). Moreover, Petitioner

never denied his guilt in the case, and he concurred in the decision of the trial attorney not to testify or present evidence in an attempt to show his innocence. (HC. 68, 81). Since the evidence was so overwhelming in favor of the state, the defense counsel determined that Petitioner would lose credibility and sympathy with the jury by attempting to assert that he had not committed the crime. Defense Attorney Pelham was most concerned about the sentencing phase of the trial, since it was virtually assured that Petitioner would be found guilty. He also geared his closing arguments, even during the guilt/innocence phase of the trial, to an attempt at alleviating the potential outrage which the jury might show against his client because of the facts.

Although Petitioner asserts that defense counsel did not invoke the rule of sequestration of witnesses, the record shows that he was specifically asked by the court if he requested said rule to be invoked, and defense counsel indicated that he did. (T. 61). Simply because defense counsel failed to object to one of the early witnesses who inadvertently violated the rule, does not show ineffectiveness. This is especially true when the witness who violated the rule was only the second witness who was called, and who could have only heard some prior testimony pertaining to where the victim had been prior to the murder. Moreover, even if the witness had violated the rule of sequestration his testimony was still admissible under Georgia law. Dudley v. State, 148 Ga. App. 560(3), 251 S.E.2d 815 (1978).

The standard for effective assistance of counsel under the Sixth Amendment of the United States Constitution appears

to be now well established. A criminal defendant is entitled to representation by an attorney reasonably likely to render and rendering reasonably effective assistance. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Jones v. Estelle, 622 F.2d 124 (1980). Of course, the standard does not require errorless counsel, nor counsel judged ineffective by hindsight. United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980). The totality of the circumstances surrounding the trial, and the entire record must be considered in examining the performance of counsel. See, e.g., Lovett v. State of Florida, 627 F.2d 706 (5th Cir. 1980); Lee v. Hopper, 499 F.2d 456 (5th Cir. 1974). "It is within this framework of the totality of circumstances, that we judge the 'fundamental fairness' of the trial, and ultimately counsel's ineffectiveness." Nelson v. Estelle, supra at p. 906.

Here a review of the entire record and Attorney Pelham's testimony at the state habeas hearing, amply demonstrates that Petitioner received effective assistance of counsel in accordance with the federal standards. Thus, certiorari should not be granted to review the second issue which Petitioner raises.

III. THE GEORGIA SUPREME COURT PROPERLY PERFORMED ITS REQUIRED DUTY TO REVIEW PETITIONER'S DEATH PENALTY IMPOSED UNDER GEORGIA'S CAPITAL PUNISHMENT STATUTORY PROCEDURE, AND PROPERLY AFFIRMED THE JURY'S FINDING IN THE INSTANT CASE THAT THE EVIDENCE SHOWED SUFFICIENT STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GA. CODE ANN. § 27-2534.1(b)(2) WHICH CONTRIBUTED TO THE IMPOSITION OF THE DEATH PENALTY AGAINST THE PETITIONER.

Petitioner's third argument in support of his petition contends that since the death penalty may no longer be imposed for the offense of armed robbery in Georgia [Collins v. State, 239 Ga. 400, 404, 236 S.E.2d 759 (1977)], it is no longer a capital felony, and therefore, may not be utilized under Ga. Code Ann. § 27-2534.1(b)(2) as a statutory aggravating circumstance supporting the imposition of the death penalty. This precise issue was raised in Petitioner's first petition for a writ of certiorari before this Court; however, this Court obviously rejected this argument, vacating the sentence and remanding instead for review in light of this Court's ruling in Godfrey v. Georgia, 446 U.S. 420 (1980). See Baker v. Georgia, 446 U.S. 961 (1980) [Petition No. 79-5567]. Petitioner has tendered no new arguments which would justify this Court's reviewing this issue at this time.

In Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. den., 439 U.S. 882 (1978), the Georgia Supreme Court

specifically addressed the aforesaid issue. This issue presented a question of statutory interpretation to the state court, and it concluded as follows:

> We construe 'capital felony' as that term is used in § 27-2534.1(b)(2) in a generic sense to include those felonies which were capital crimes in Georgia at the time this section of our death penalty statute was enacted. Id., at p. 432.

The Georgia Supreme Court has continued to consistently hold that armed robbery is a capital felony for the purpose of finding aggravating circumstances. See Bowden v. State, 239 Ga. 821, 829, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978); Davis v. State, 241 Ga. 376, 384, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978); Young v. Ricketts, 242 Ga. 559, 562, 250 S.E.2d 404 (1978), cert. den., 442 U.S. 934 (1979); Baker v. State, 243 Ga. 710, 711, 257 S.E.2d 192 (1979), sentence vacated on other grounds, Baker v. Georgia, 446 U.S. 961 (1980); Cobb v. State, 244 Ga. 344, 356-357, 260 S.E.2d 60 (1979).

Armed robbery was an aggravating circumstance supporting the death penalty in Gregg v. Georgia, 428 U.S. 153, 161 (1976), and in the case of Coker v. Georgia, 433 U.S. 584 (1977). This Court recognized without disapproval that under Georgia law armed robbery is considered a capital felony for the purpose of applying the aggravating circumstance provision of the Georgia Code. Id., at p. 599, n. 15.

In holding that armed robbery may be considered a capital felony for the purposes of Code § 27-2534.1(b)(2), the Georgia Supreme Court has correctly applied the basic premise that the objective of a court in construing statutory construction is to ascertain the intent of the Legislature and to give effect to that legislative will. Philbrook v. Glodgett, 421 U.S. 707 (1975).

Thus, for the aforesaid reasons, Petitioner's contentions under Section III in support of his application for a writ of certiorari, should be found to be unmeritorious.

IV. THE TRIAL COURT PROPERLY PERMITTED THE JURY TO CORRECT ITS SENTENCING VERDICT IN PETITIONER'S CASE.

Under Petitioner's fourth argument he asserts that because the jury initially drafted an insufficient verdict pertaining to Ga. Code Ann. § 27-2534.1(b)(2), that aggravating circumstance could not support Petitioner's death penalty.

A review of the record shows that upon reaching its verdict during sentencing pertaining to the (b)(2) aggravating circumstance the jury recommended death and found that, "The offense of murder was committed while the offender to incident the armed robbery of Dennis Beatenbaugh." (T. 309). At that time the jury also made a finding under the (b)(7) aggravating circumstance.

The trial judge immediately questioned the jury foreman as to the form of its verdict on the (b)(2) aggravating circumstance. The foreman indicated that he had intended, in his writing, to

state that the murder had been committed while the Petitioner had been enaged in an armed robbery. The court allowed the correction to be made. (T. 309-310).

Under Ga. Code Ann. § 110-105, "Verdicts shall have a reasonable intendment, and shall receive a reasonable construction, and shall not be avoided except by necessity." See Jackson v. Houston, 200 Ga. 399, 400, 375 S.E.2d 399 (1946). If the meaning of a verdict is clear, the misuse of words or errors in spelling or grammar will not invalidate it. Id. Jury verdicts should be construed with reference to the indictment, the court's instructions, and the entire record to arrive at the intention of the jury, and all intendments should be made to sustain the verdict. United States v. Nooks, 446 F.2d 1283 (5th Cir. 1971), cert. den., 404 U.S. 945 (1971).

It is clear here that the trial court merely permitted the foreman to correct the verdict which he had erroneously drafted. Under such circumstances, this Court need not grant the petition for a writ of certiorari to review Petitioner's fourth issue.

V. THE SUPREME COURT OF GEORGIA PROPERLY AFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7).

Under Petitioner's fifth argument, he contends that certiorari should be granted to review Petitioner's death sentence which is based in part upon a jury finding that statutory aggravating circumstances existed under Ga. Code Ann. § 27-2534.1(b)(7). Petitioner asserts that the trial court erroneously failed to instruct on the terminology of the (b)(7) aggravating circumstance, and additionally asserts that because of the trial court's alleged failure to render proper instructions and as a result of the prosecutor's arguments to the jury there is a strong likelihood that the death penalty in this case was based upon an inappropriate consideration of post-mortem abuse of the victim.

As has previously been noted, following the sentencing portion of Petitioner's trial, the jury returned a death penalty verdict based in part upon its finding that the murder in this case was "outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the Defendant." (T. 309). See Ga. Code Ann. § 27-2534.1(b)(7). At trial, the trial judge instructed the jury that before it was authorized to recommend the death penalty, it was necessary for the jury to find the existence of a statutory aggravating circumstance beyond a reasonable doubt. (T. 303, 304, 305, 306). The court instructed on the statutory definition of the (b)(7) aggravating circumstance (T. 304), and specifically instructed

that if an aggravating circumstance was not found, or if an aggravating circumstance was found and the jury chose to recommend a life sentence, then it would be incumbent upon the court to sentence the defendant to life imprisonment. (T. 305-306). It is clear from the record that the trial court did not specifically define the terminology within Ga. Code Ann. § 27-2534.1(b)(7).

In other cases, the Georgia Supreme Court has recognized that with the exception of the term "aggravated battery," the remainder of the terminology contained under (b)(7) require no explication. Gilreath v. State, 247 Ga. 814, 836, 279 S.E.2d 650 (1981); Stevens v. State, 245 Ga. 583, 586, 266 S.E.2d 194 (1980), cert. den., ___U.S.___, 101 S.Ct. 251 (1980); Burger v. State, 245 Ga. 458, 462, 265 S.E.2d 796 (1980), cert. den., 446 U.S. 988 (1980). This holding by the Georgia Supreme Court was correct. Recently, in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), cert. den., ___U.S.___, 101 S.Ct. 796 (1980), the Georgia Supreme Court engaged in a detailed analysis of the (b)(7) aggravating circumstance. In regards to the first portion of the statutory aggravating circumstance, the court stated:

> The phrases 'outrageously or wantonly vile, horrible or inhuman' are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate, from those murders for which the death penalty may be imposed. Citing, Godfrey v. Georgia, 446 U.S. 420 (1980). Hance, supra at p. 861.

Godfrey v. Georgia, supra, specifically dealt with the application of Ga. Code Ann. § 27-2534.1(b)(7) in that case. The jury in Godfrey recommended a death sentence based upon only a partial finding under (b)(7) that the murder of the victim had been "outrageously or wantonly vile, horrible and inhuman." It was in this regard that the Court held that there was nothing in these few words, standing alone, that implied any inherent restraint upon the arbitrary and capricious infliction of the death sentence. This Court specifically reviewed the remainder of the (b)(7) aggravating circumstance which required either an aggravated battery to the victim, torture to the victim, or depravity of mind on the part of the defendant, and found all three lacking.

In the instant case, the jury made findings under both portions of the (b)(7) aggravating circumstance, and as opposed to Godfrey, the wording of the jury's finding in this case is sufficiently definite to insure against any arbitrariness or any capricious infliction of the death sentence, and the record as reviewed by the Georgia Supreme Court, demonstrated ample evidence to support the jury's finding that the victim suffered from torture and that the Petitioner had demontrated his depravity of mind beyond all doubt. In light of the aforesaid instructions to the jury, in light of the detailed review by the Georgia Supreme Court which insured said instructions were not applied arbitrarily or capriciously to the facts of this case, in light of the overwhelming evidence demonstrating aggravating circumstances under (b)(7), and in light of the simplicity of terms utilized therein, it is clear that Petitioner could not have been harmed by the absence of an explanation to the jury of the individual

meaning of the terms in Code § 27-2534.1(b)(7). This Court should also take notice that although the term "aggravated battery" was not explained to the jury, the jury did not make a finding on this portion of the (b)(7) aggravating circumstance.

Although Petitioner asserts that there is a strong likelihood that Petitioner's death penalty was based, at least in part, on an inappropriate consideration of post-mortem abuse of the victim, Petitioner's argument is based chiefly upon a portion of the district attorney's argument to the jury which is taken out of context. It appears that in making his remarks to the jury, the district attorney was referring to the entire circumstances surrounding the shooting.

In Petitioner's confession to the police he related in detail how he had smashed a whiskey bottle over the head of the victim. He further admitted,

> I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and I pulled the trigger. I don't know how many times I shot him, but I could hear him moaning and trying to say something. . . (T. 151). (Emphasis added).

Gwinnett County Medical Examiner, Dr. Dove, performed the autopsy on the victim and testified that Dennis Beatenbo had received a crushing blow to his face which had broken his nose and had extensively damaged the tissue around both eyes. There

was also a bruise on the victim's forearm which was classified as a defensive type wound. (T. 102).

Furthermore, Dr. Dove testified that the victim suffered from three separate chest wounds from a gun which had been placed against his body and fired. At least two of these wounds could have inflicted pain and anguish upon the victim.

In summary, upon viewing all of the evidence, it is apparent that a reasonable, rational juror could have concluded that Dennis Beatenbo had been struck violently across the face and shot at least twice in the chest before a third shot killed him. A reasonable juror could also have concluded that this attack resulted in anogizing pain to the victim before he died.

Respondent submits that the aforesaid also demonstrates Petitioner's depravity of mind beyond all reasonable doubt. The aforecited acts surrounding the murder show a cold-blooded, brutal attack upon a helpless victim. The jury's finding of depravity of mind can best be supported simply by a review of those facts and by referring to a statement made by the Petitioner in answer to the question as to why he killed the victim. Petitioner answered simply, "Just to watch him die." (T. 168).

In conclusion, since the prosecutor's remarks did not deprive Petitioner of a fundamentally fair sentencing proceeding, and since the failure to define the individual terminology of (b)(7) did not harm Petitioner, in light of the overwhelming evidence supporting same and in light of the Georgia Supreme Court's review, this Court should decline to grant the writ to review Petitioner's fifth argument.

VI. THE TRIAL COURT MADE NO PREJUDICIAL, IMPROPER COMMENTS TO THE JURY.

Under Petitioner's sixth argument, he asserts that the trial court committed prejudicial error my making improper statements to the jury, allegedly insinuating surprise that the defendant had presented no evidence, and allegedly insinuating to the jury that they may not have heard all of the evidence. As the state habeas court concluded, these allegations are strained interpretations of the comments made by the trial court. For example, when Petitioner states that the court expressed surprise when the court asked, "The defendant has no evidence?"(T. 180), Petitioner is merely speculating. There is no indication from the cold record that the court in any way expressed anything beyond posing the mere question to determine what procedural steps the defendart wished to follow. Other statements made by the trial court, cited in Petitioner's brief, were merely explanations to the jury as to why they were asked to leave the courtroom. As the state habeas court noted, these statements would tend to minimize confusion and enlighten the jurors who may have well been wondering if, in fact, they had not heard all of the evidence while they were excused from the courtroom. (See Petitioner's Appendix D).

Since the state habeas court properly found that the trial judge's comments, as cited in Petitioner's brief, did not violate any of Petitioner's rights, this Court should refuse to grant certiorari to review Petitioner's sixth argument.

VII. EVEN IF THIS COURT SHOULD FIND THAT ONE OF THE AGGRAVATING CIRCUMSTANCES SUPPORTING PETITIONER'S DEATH PENALTY IS INVALID, HIS DEATH SENTENCE SHOULD NOT BE VACATED BECAUSE OF THE EXISTENCE OF AN ADDITIONAL AGGRAVATING CIRCUMSTANCE.

Under Petitioner's seventh argument, he asserts that should this Court declare one of his statutory aggravating circumstances supporting his death penalty to be invalid, then pursuant to Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), rehng. den. and modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S. L.W. 3244 (1981),[1/] his death penalty should be vacated. Of course, arguments raised in Stephens are not relevant to this case, unless this Court finds that one of the statutory aggravating circumstances supporting Petitioner's death penalty is invalid. Assuming arguendo that situation arises, it appears that Stephens would be controlling; however, since there is no constitutional infirmity with either of the statutory aggravating circumstances supporting Petitioner's death penalty, Respondent submits that Stephens would have no bearing on this case. Thus, Petitioner's seventh argument presents no valid reason for granting the writ of certiorari in this case.

1/ On May 3, 1982, this Court issued an order certifying a question back to the Georgia Supreme Court pertaining to the issue raised on appeal; however, this Court retained jurisdiction. Zant v. Stephens, 31 Cr.L.R. 3035 (May 3, 1982).

VIII. IN LIGHT OF THE HEINOUS AND DEPRAVED NATURE OF THE MURDER IN THIS CASE, THE POTENTIAL MITIGATING FACTORS RAISED AT TRIAL BY PETITIONER DO NOT SUPPORT A FINDING THAT HIS DEATH PENALTY CONSTITUES CRUEL AND UNUSUAL PUNISHMENT.

Under Petitioner's eighth argument, he asserts that his death penalty constitues cruel and unusual punishment in light of an absence of a prior criminal record, in light of his age at the time of the crime, and in light of his alleged intoxication during the incident. In support of his contentions, Petitioner cites Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982). Of course, in Eddings this Court did not reach the issue as to whether or not the Eighth Amendment forbid the execution of a youthful offender who was sixteen at the time of the offense. Id., at p. 874, fn. 5. In Eddings this Court vacated the death penalty and remanded so that the trial court could have an opportunity to consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances in light of the Eddings' opinion. Id., at p. 877.

Eddings is clearly distinguishable from the instant case, where the trial judge specifically instructed the jury that in arriving at their verdict, they were authorized to consider any mitigating evidence presented during the case. (T. 305). The trial court instructed the jury that even if it found statutory aggravating circumstances it still could provide for a life sentence for any reason it cared to do so. (T. 306).

There is no indication in this case, that the jury did not follow the trial court's instructions. As is noted in Petitioner's brief, Petitioner was nineteen years old at the time the crime was committed. Petitioner was old enough to purchase a pistol, viciously engage in a surprise attack upon victim Dennis Beatenbo, and maliciously murder him by firing point blank into Dennis Beatenbo's chest as he lie helpless and wounded on the ground. None of the factors listed by Petitioner can, in any way, mitigate his actions. Thus, this Court should decline to review the issues raised by his eighth argument.

IX. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL RELATING TO THE JURY'S CONSIDERATION OF MITIGATING AND AGGRAVATING CIRCUMSTANCES WERE SUFFICIENT.

Under Petitioner's ninth argument, he asserts that during the punishment phase of his trial, the trial court failed to give sufficient jury instructions on mitigating circumstances, and failed to charge that mitigating circumstances could outweigh the aggravating circumstances and thus require the sentencer to impose a verdict of life imprisonment rather than death.

As was previously noted, the trial judge did instruct the jury that before they were authorized to impose the death penalty, it was incumbent upon the state to demonstrate the existence of aggravating circumstances beyond a reasonable doubt.

Moreover, the trial court specifically charged the jury that even if it found the existence of aggravating circumstances, it could still impose a life sentence. The court went on to say:

> The sentence to be imposed in this case is a matter entirely within your discretion. And you may provide for a life sentence for this accused for any reason that is satisfactory to you, or you -- or without any reason, if you care to do so.
>
> The law vests the exclusive rights or right to the Jury to make or withhold a recommendation of a death sentence. (T. 306).

Although Petitioner appears to contend that the jury should have been instructed on the balancing of aggravating circumstances and mitigating circumstances, such a balancing is not required under the Georgia statute, and as the trial judge correctly stated, the jury may recommend a life sentence even though the aggravating circumstances far outweigh the mitigating circumstances or even though there are no mitigating circumstances. See Collier v. State, 244 Ga. 553, 569, 261 S.E.2d 364 (1979), cert. den., 445 U.S. 946 (1980); Jarrell v. Zant, 248 Ga. 492, 493, 284 S.E.2d 17 (1981).

Of course, this Court has expounded upon the requirement that the sentencer's discretion be guided in death penalty cases. In analyzing this requirement, the test to be applied, as enunciated in Godfrey v. Georgia, 446 U.S. 420 (1980) is:

'[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Citing Gregg v. Georgia, 428 U.S. 153, 159 (1976).

A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many in which it is not.' Id., at 188, 96 S.Ct. at 2932 [cases omitted].

This means that . . . a state . . . must channel the sentencer's discretion by 'clear and objective standards' and 'specific and detailed guidance,' and that 'makes rationally reviewable the process for imposing a sentence of death.' [Citations and footnotes omitted]. Godfrey v. Georgia, 100 S.Ct. at p. 1764-1765.

When the trial court's instructions in this case are considered in their totality, including the references to the requirement that the jury must find beyond a reasonable doubt at least one of the statutory aggravating circumstances, the jury's discretion has been sufficiently directed and limited so as to minimize the risk of an arbitrary or capricious decision.

Although Petitioner asserts that the term mitigating circumstances should have been defined for the jury, Respondent submits that because of the simplicity of the term such a specific definition was not constitutionally required. The Georgia

Supreme Court has consistently held that mitigating circumstances need not be singled out for the jury. See Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. den., 445 U.S. 946 (1980); Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979), cert. den., 445 U.S. 972 (1980); Cape v. State, 246 Ga. 520, 526, 272 S.E.2d 487 (1980), cert. den., 449 U.S. 1134 (1981).

It is not required that any certain litany of words be utilized in appraising the jury that it should consider mitigating circumstances. In Jurek v. Texas, 428 U.S. 262 (1976), the Texas jury never heard the phrase "mitigating circumstances" nor did it ever receive a definition of same.

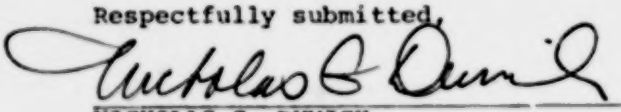
As the Georgia Supreme Court has correctly noted, the delineation of some factors by the trial court, which could have constituted mitigating circumstances, may have tended to overemphasize those factors, thus invading the jury's inherent prerogative to consider anything as mitigating. Collier v. State, 244 Ga. at p. 568-569. This danger is real as is evidenced by the recent decision in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), where the Court found reversible error during the sentencing phase of the defendant's trial, when the trial court had instructed the jury that in making its determination on sentencing, the jury could consider two specific mitigating circumstances. Although the trial court had referred to the word "only" when instructing the jury that it could consider certain specific aggravating circumstances, and the Court omitted the word "only" when instructing on mitigating circumstances; nevertheless, notwithstanding the clarity of the trial court's wording, the Court of Appeals found that a reasonable juror still may have interpreted the instructions as indicating that the jury

was limited to the two specific mitigating factors. This case underlines Respondent's argument and the Georgia Supreme Court's concern, that if specific mitigating factors are outlined, death penalty petitioners will be quick to argue that the court's enunciation of same may limit the jury's discretion in considering other matters in addition to the examples given. In conclusion, since the instructions, when taken as a whole, sufficiently guided the jury's discretion and informed them that they could consider mitigating factors in making their determination upon sentencing, and that they could impose a life sentence for any reason, even if they found aggravating circumstances, Respondent respectfully submits that this Court should decline Petitioner's request to review the argument set out in his ninth contention.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests this Court to deny Petitioner's request for a writ of certiorari.

Respectfully submitted,



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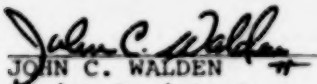

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